Dedicated Terminals Exception to Copyright: FAQs on What it Means for Libraries (June 2016)

Among the changes to UK copyright law introduced on June 1\textsuperscript{st} 2014 was an exception to copyright permitting educational institutions, not for profit publically accessible libraries, archives and museums to make digitised collection items available on site via “dedicated terminals”. This implements a provision in the Information Society Directive (InfoSoc Directive 2001/29).

40B Libraries and educational establishments etc: making works available through dedicated terminals

(1) Copyright in a work is not infringed by an institution specified in subsection (2) communicating the work to the public or making it available to the public by means of a dedicated terminal on its premises, if the conditions in subsection (3) are met.

(2) The institutions are—
   (a) a library,
   (b) an archive,
   (c) a museum, and
   (d) an educational establishment.

(3) The conditions are that the work or a copy of the work—
   (a) has been lawfully acquired by the institution,
   (b) is communicated or made available to individual members of the public for the purposes of research or private study, and
   (c) is communicated or made available in compliance with any purchase or licensing terms to which the work is subject.

Further information about this exception is available here.
In April 2016, the impact of this new exception was debated by a Speakers’ Panel at the CILIP Copyright Executive Briefing. The key issues raised during that discussion were captured and form the basis of this set of FAQs.

Please note that it is currently unclear what Britain’s decision to leave the EU will have in terms of copyright. As and when we can establish more clarity about the legislative impact in consultation with Government officials and other colleagues, LACA will provide published guidance to the community and this FAQ document will be updated accordingly. Click here for LACA’s statement on Brexit.

What is a “Dedicated Terminal”?
There is, at present, no definitive answer, but it is likely that this refers to a terminal used specifically to access the digitised materials enabled by the exception. Like all the copyright exceptions, interpretation is often down to informed risk management.

In 2015 the Intellectual Property Minister suggested it was a tool for libraries to make older, rarer, more fragile works available, but this is a modest interpretation of the law. In German Higher Education the equivalent exception has been given a much wider interpretation. The Technical University of Darmstadt successfully used the exception to justify digitising the full text of recently published text books in order to make them available on dedicated terminals (see Case C117/13, 11).

Can an entire collection be digitised and made available on a dedicated terminal?
No. In Case C117/13, 11, referred to above, the Court of Justice of the European Union (CJEU) ruled that mass digitisation is not permitted under this exception.

Can preservation copies be made available on a dedicated terminal?
Yes, this is permitted as long as copies are made within the parameters of this exception and any further use (including copying) is carried under subsequent exceptions to copyright, such as non commercial research and private study.

Can unpublished works be made available on a dedicated terminal?
Yes, this is permitted.

Can a dedicated terminal also provide internet?
This use would be subject to interpretation and appetites for risk, because the exception refers to a “dedicated terminal”.

Where can dedicated terminals be installed?
Dedicated terminals can be placed in libraries, archives, museums and educational establishments and accessible to walk in users. In educational establishments, you could install dedicated terminals in the university’s library and language labs, for example. The device must be on the premises.
Can portable devices such as tablets be regarded as dedicated terminals? Views are mixed. If a tablet is dedicated to the purpose of making the material available at the time it is being used, possibly it can be, but this will be subject to interpretation and potentially an appetite for risk.

How many copies of a work can be consulted at one time? Again there is no definitive answer as this is not stipulated in the InfoSoc Directive, or in the UK regulation that implemented the Directive. However, in the equivalent German legislation, the number of people accessing a work on a terminal is limited to the number of physical copies in the library, and the CJEU seems to be in favour of the way the German legislator has implemented this provision. Whilst it is possible that a UK court might take a more permissive view on the issue of simultaneous access, it is advisable to be prudent and mirror the number of physical copies in the collection.

Can users make further copies? Not under section 40B of the CDPA 1988. However, 40B does not preclude the user from relying on other exceptions, such as copying for non commercial research or private study.

Librarians in libraries that are not conducted for profit can rely on section 42A of the CDPA 1988 to make and supply single copies of published works if the necessary conditions are met.

Can licensing terms override the dedicated terminal exception? Yes. Whilst the 2014 copyright reforms did introduce provision to protect copyright exceptions from override by contract, this does not apply in the case of the dedicated terminal exception. However, an organisation is only prevented from using 40B if it has accepted licensing terms from a publisher. Organisations are free to reject any licensing terms offered to them (see Case C117/13, 11).